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CERTIFICATE

Supreme Court of the United States

OCTOBER TERM, ~~1941~~ 1942

No. ~~1128~~ 70

ADRIAN ETTELSON, JOSEPH A. FEDER, JACK RINZLER, ET AL.

vs.

METROPOLITAN LIFE INSURANCE COMPANY

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

FILED APRIL 9, 1942.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 11, 1942.

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[fol. 1] **IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1941**

No. 7933

ADRIAN ETTELSON and JOSEPH A. FEDER, JACK RINZLER and Simon Fabian, also known as Simon H. Fabian, guardians of the person and property of Harriot also known as Harriet Ettelson, and Joseph A. Feder, Jack Rinzler and Simon Fabian, also known as Simon H. Fabian, guardians of the person and property of Doris Ettelson, Plaintiffs-Appellants

v.

METROPOLITAN LIFE INSURANCE COMPANY, Defendant

Certificate to the Supreme Court of the United States

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

STATEMENT OF FACTS

In the above entitled case an appeal has been taken to this court from an order of the District Court of the United States for the District of New Jersey entered on December 29, 1941.

The plaintiffs' complaint states in five counts claims for sums alleged to be due and payable to the plaintiffs by the defendant under certain policies of insurance issued by it upon the life of Richard Ettelson, who died on July 11, 1939. The complaint was filed in the New Jersey Supreme Court and on January 16, 1940 was removed by the defendant to the District Court of the United States for the Dis-
[fol. 2] trict of New Jersey.

The defendant filed in the district court on January 20, 1940 an answer to the complaint which set up a series of defenses to the effect that the policies in suit were obtained by the fraud of the insured and are void because of material false statements made by the insured in the application for the said policies. The answer did not aver that the said false statements were knowingly and intentionally made. The defendant filed with its answer a counterclaim which

also alleged that the policies in suit were obtained by the fraud of the insured and are void because of the said material false statements made by the insured in the application for the said policies, and prayed that the policies be decreed null and void upon the return by the defendant of the premiums paid thereon and that the plaintiffs be enjoined from further prosecuting their action at law against the defendant.

Thereafter the plaintiffs moved the district court to dismiss the defendant's counterclaim upon the ground that the "defendant has an adequate remedy on the law side of the Federal Court in the action at law instituted in the New Jersey Supreme Court November 13, 1939 and removed by defendant to the Federal Court and in which issue has since been joined", and that "said counterclaim fails to state a claim upon which equitable relief can or should be granted by the Federal Court." On December 26, 1941 the district court filed its opinion (42 F. Supp. 488) in which it concluded that the plaintiffs' motion to dismiss the counterclaim should be denied and on December 29, [fol. 3] 1941 the district court entered the following order:

It is Ordered on this 29th day of December, 1941 on motion of McCarter, English & Egner, attorneys for the defendant and counterclaimant, Metropolitan Life Insurance Company, that the motion of the plaintiffs to strike out and dismiss the said counterclaim be and it is denied,

It is further Ordered that the issue raised by the counterclaim of the Metropolitan Life Insurance Company be heard and disposed of by the court sitting in equity prior to the issue raised by the complaint filed by the plaintiffs in the action at law in which a jury trial has been demanded by the plaintiffs.

The present appeal to this court was taken from the said order of the district court entered December 29, 1941. The defendant has moved this court to dismiss the appeal upon the ground that the order from which the appeal was taken is not an appealable order.

Question

The United States Circuit Court of Appeals for the Third Circuit, being in doubt as to whether the order appealed from is an order granting an injunction and, therefore, ap-

pealable under Section 129 of the Judicial Code (28 U. S. C. § 227) as construed by the Supreme Court in Enelow v. New York Life Insurance Company, 293 U. S. 379, in the light of the effect upon that decision of the union of law and equity in one form of action accomplished by Rule 2 of the Federal Rules of Civil Procedure, adopted pursuant to Section 2 of the Act of June 19, 1934, c. 651, 48 Stat. 1064 (28 U. S. C. § 723c), and in view of the considerations advanced by the Circuit Court of Appeals for the Second Circuit in the case of Beannit Mills, Inc. v. Eday Fabric Sales Corporation, 124 F. 2d 563, hereby certifies the fol-

[fol. 4] lowing question of law concerning which it desires instruction for the proper decision of the above entitled case, to wit:

In a civil action in a district court upon a claim of a character formerly cognizable at law in which the defendant has filed a counterclaim of a character formerly cognizable in equity (or in an action at law under the provisions of Section 274b of the Judicial Code), is an order that the issue raised by the counterclaim shall be heard and disposed of by the court prior to the issue raised by the complaint an order granting an injunction within the meaning of Section 129 of the Judicial Code and therefore appealable under that section?

Albert B. Maris, Circuit Judge; William Clark, Circuit Judge; Charles Alvin Jones, Circuit Judge.

[fol. 5] Clerk's Certificate to foregoing paper omitted in printing.

Endorsed on Cover: File No. 46,456, U. S. Circuit Court of Appeals, Third Circuit, Term No. 1128, Adrian Ettelson, Joseph A. Feder, Jack Rinzler, et al., vs. Certificate. Metropolitan Life Insurance Company. Filed April 9, 1942, Term No. 1128 O. T. 1941.